

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION**

-----X		
In re:	:	Chapter 11
	:	
CIRCUIT CITY STORES, INC., <u>et al.</u> ,	:	Case No. 08-35653-KRH
	:	
	:	Jointly Administered
Debtors.	:	
-----X		

**OBJECTION OF JEFFREY R. LEOPOLD TO THE DEBTORS' MOTION TO  
REJECT HIS SEVERANCE AGREEMENT AND RELEASE OF CLAIMS**

COMES NOW Jeffrey R. Leopold ("Mr. Leopold"), by counsel, and respectfully states as follows for his Objection to the Debtor's Motion to Reject His Severance Agreement and Release of Claims.

**BACKGROUND**

1. In the evening hours of Friday December 12, 2008, the Debtors filed their First Omnibus Motion for Order Pursuant to Bankruptcy Code 105(a) and 365(a) and Bankruptcy Rule 6006 Authorizing Rejection of Certain Executory Contracts (the "Rejection Motion"), which seeks, *inter alia*, the rejection of Mr. Leopold's Severance Agreement and Release of Claims dated July 18, 2008 (the "Severance Agreement"). A copy of the Severance Agreement is attached hereto as Exhibit A. The Rejection Motion provides that objections thereto are due on or before 4:00 p.m. on December 18, 2008, and a hearing is scheduled thereon for Monday, December 22, 2008.

## **ARGUMENT**

### **Mr. Leopold's Severance Agreement is No Longer Executory and Accordingly, May Not be Rejected Under Section 365 of the Bankruptcy Code.**

2. Section 365(a) of the Bankruptcy Code provides in pertinent part that “the Trustee [debtor-in-possession], subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). “A contract is executory if performance is due to some extent on both sides.” *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.)*, 556 F.2d 1043, 1045 (4<sup>th</sup> Cir. 1985) (citing *NLRB v. Bildisco and Bildisco*, 465 U.S. 513 (1984)). In addition, the Fourth Circuit has adopted Professor Countryman’s “more specific test” for determining whether a contract is “executory”. Under the Countryman test, a contract is executory if the “obligations of both the bankrupt and the other party to the contract are so underperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other.” *Id.*, quoting *Gloria Manufacturing Corp. v. International Ladies’ Garment Workers’ Union*, 734 F.2d 1020, 1022 (4<sup>th</sup> Cir. 1984).

3. Under the Countrymen approach Mr. Leopold’s Severance Agreement is no longer executory. Mr. Leopold has fully performed under the Severance Agreement and the only obligations that remain are those of the Debtors to pay Mr. Leopold the remainder of his severance payments. *See In re Spectrum Information Technologies, Inc.*, 193 BR 400, 403-404 (Bankr. E.D.N.Y. 1996) (holding that employment contract is not executory where the only remaining obligations are the debtor’s obligation to make severance payments (citations omitted)). The Debtors cannot accept the benefit of Mr. Leopold’s faithful performance of his Severance Agreement and reject the burden of that Severance Agreement, namely payment of his severance pay.

**WHEREFORE**, Jeffrey R. Leopold respectfully requests that this Court sustain this objection and overrule the Debtors' Motion to Reject his Severance Agreement and Release of Claims dated July 18, 2008, and to grant such other and further relief as this court deems just and proper.

Dated: December 18, 2008

Respectfully submitted,

/s/ Michael D. Mueller

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 18<sup>th</sup> day of December, 2008, I caused a copy of the foregoing to be served by electronic means on the "2002" and "Core" lists and through the ECF system.

/s/ Michael D. Mueller

Michael D. Mueller